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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THAMAR YARBROUGH,

Defendant and Appellant.

B220542

(Los Angeles County  
Super. Ct. No. PA063578)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Cynthia L. Ulfig, Judge. Affirmed as modified.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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Thamar Yarbrough (appellant) entered a plea of no contest to six counts of robbery (Pen. Code, § 211)<sup>1</sup> (counts 1, 2, 4, 7, 8, & 11); and one count of assault with a semiautomatic firearm (§ 245, subd. (b)) (count 6). Appellant admitted a special allegation of firearm use under section 12022.53, subdivision (b) in four of the robbery counts (counts 1, 2, 4, & 11). Appellant admitted the personal use of a firearm allegation under section 12022.5, subdivision (a) and the great bodily injury allegation under section 12022.7, subdivision (a) in count 6. Appellant admitted personal discharge of a firearm under section 12022.53, subdivision (c) in relation to count 7. The trial court dismissed the remaining counts, and gang allegations were stricken in accordance with plea negotiations.

The trial court sentenced appellant to a total of 48 years in state prison. In count 6, the base term, the trial court imposed the upper term of nine years for the assault; 10 years for personal use of a firearm under section 12022.5, subdivision (a); and three years for the great bodily injury enhancement under section 12022.7, subdivision (a) for a total sentence of 22 years on that count. In counts 1, 2, 4, and 11, the trial court imposed one year (one-third the midterm of three years) for the robberies, and three years four months for the firearm use under section 12022.53, subdivision (b), for a total of four years four months in each of those counts. In count 7, the trial court imposed one year (one-third the midterm of three years) for the robbery and six years eight months for the personal discharge of a firearm under section 12022.53, subdivision (c), for a total of seven years eight months in that count. The trial court imposed one year in count 8. All of the terms were ordered to run consecutively. In addition to a restitution fine, court security fee, criminal conviction assessment, and other fees, appellant was ordered to pay Los Angeles County \$5,500 for his legal representation under section 987.8.

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<sup>1</sup> All further references to statutes are to the Penal Code unless stated otherwise.

Appellant appeals on the ground that the order requiring him to pay the cost of his legal representation should be vacated.

### **FACTS**

A detailed discussion of the facts is not warranted, since appellant's appeal is related only to orders made at sentencing. Appellant was charged with committing a series of armed robberies in a 14-count information. Appellant was also charged with the unlawful driving or taking of a vehicle, assault with a firearm, and assault with a semiautomatic firearm in connection with some of the robberies. During one of the robberies, appellant caused great bodily injury by shooting the victim's brother, who had come to his brother's aid.

### **DISCUSSION**

#### **I. Appellant's Argument**

Appellant contends that there is no evidence to support the implied finding that he had the ability to pay the cost of his representation. Therefore, the order compelling him to pay such cost should be vacated. Appellant argues, citing *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), that his claim was not forfeited by failure to object below.

#### **II. Proceedings Below**

After imposing sentence and notifying appellant of the fines and fees he had to pay, the trial court stated without explanation: "In addition, he is to pay \$5,000 in attorney's fees; that is \$4,500 for the attorney, as well as \$1,000 in investigative costs—actually, the total is \$5,500."

#### **III. Relevant Authority**

Section 987.8 provides that a court may order a defendant to reimburse the county for the costs of legal representation. The trial court, at the conclusion of the trial, and after notice and a hearing, must make a determination of the defendant's ability to pay all or a portion of the actual costs of his or her legal representation. "[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and

therefore require due process of law, including notice and a hearing.”” (*People v. Smith* (2000) 81 Cal.App.4th 630, 637.)

The court may also hold a second hearing within six months of the conclusion of the criminal proceedings to determine whether changed circumstances have affected a defendant’s ability to reimburse the cost of the legal assistance provided.<sup>2</sup> The defendant must be given notice and afforded specific procedural rights, including the right to present witnesses at the hearings and to confront and cross-examine adverse witnesses.<sup>3</sup> Moreover, a criminal defendant must be informed of his or her potential obligation to reimburse the county for costs of legal representation before counsel is even appointed.<sup>4</sup>

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<sup>2</sup> Section 987.8 subdivision (b) provides: “In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.”

<sup>3</sup> Section 987.8, subdivision (e) provides in pertinent part: “At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the following rights:

- “(1) The right to be heard in person.
- “(2) The right to present witnesses and other documentary evidence.
- “(3) The right to confront and cross-examine adverse witnesses.
- “(4) The right to have the evidence against him or her disclosed to him or her.
- “(5) The right to a written statement of the findings of the court.”

<sup>4</sup> Section 987.8, subdivision (f) specifies: “Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. . . .”

Under the statutory scheme, there is a presumption that a defendant sentenced to prison does not have the ability to reimburse defense costs. However, this presumption may be overcome by proof of unusual circumstances.<sup>5</sup>

### **III. Failure to Comply With Section 987.8**

Respondent contends appellant has forfeited this issue by his failure to object below. Appellant argues that the evidence was necessarily insufficient to support even an implied finding of ability to pay, and he can challenge this insufficiency even without objecting below under the reasoning of *Viray, supra*, 134 Cal.App.4th at page 1217. In *Viray*, an order to pay attorney fees was reversed, inter alia, due to a lack of substantial evidence of the defendant's ability to pay, even in the absence of an objection in the trial court. (*Ibid.*)

It is true that an appellate court generally will not consider a procedural defect if an objection could have been presented below but was not. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590 (*Saunders*).) The forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from failing to object and then claiming error after an unfavorable outcome. (*People v. French* (2008) 43 Cal.4th 36, 46.) The contention that a judgment is not supported by substantial evidence, however, is an exception to the forfeiture rule. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126.) Moreover, this exception is not limited to judgments but applies equally to orders based on required findings. (*Ibid.*) Therefore, because appellant challenges the sufficiency of the evidence in support of the implicit finding of his ability

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<sup>5</sup> Section 987.8, subdivision (g)(2)(B) provides that when determining a defendant's "[a]bility to pay" the court should consider "[t]he defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense."

to pay the fees, he can raise this challenge for the first time on appeal. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537; see also *People v. Butler, supra*, 31 Cal.4th at p. 1126; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1121.)

We agree with appellant that the order to pay for his legal representation was error. The reimbursement order was not supported by substantial evidence of appellant's ability to pay any amount, and the record shows the trial court did not conduct an on-the-record hearing to determine this issue. In addition, the record contains no evidence of notice or of the actual costs of appellant's defense. Neither the record of the arraignment nor the probation report contains any indication that appellant was given notice of the possibility he might be ordered to reimburse the costs of his legal representation before counsel was appointed.

We therefore reverse the order regarding reimbursement of attorney fees. We conclude there is insufficient evidence of appellant's ability to pay these fees. We also conclude that remanding for a hearing on appellant's ability to pay, as respondent suggests, is inappropriate given the presumption that a defendant sentenced to state prison lacks a "reasonably discernible future financial ability to reimburse the costs of his or her defense" absent a finding of "unusual circumstances." (§ 987.8, subd. (g)(2)(B); see *People v. Lopez, supra*, 129 Cal.App.4th at p. 1537 ["express finding of unusual circumstances [required] before ordering a state prisoner to reimburse his or her attorney"].) There is nothing in the record to suggest that the trial court could find an unusual circumstance given the length of appellant's sentence and the indication in the probation report that he continually committed robberies and other forms of theft as a way of life. (Cf. *People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069 [remand appropriate because appellant might be able to pay at least a portion of attorney's cost, since he owned jewelry worth \$1,500 and had been "'stable and employed'"].) Under the circumstances of appellant's case, we strike the attorney fee award without remand in the interest of judicial economy.

### **DISPOSITION**

The judgment is modified to strike the order requiring appellant to pay attorney fees in the amount of \$5,500 pursuant to section 987.8. The judgment is affirmed in all other respects.

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\_\_\_\_\_, P. J.  
BOREN

We concur:

\_\_\_\_\_, J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ